THE LAW OF COMMERCIAL ARBITRATION AND THE NEW YORK STATUTE

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The decision of the New York Court of Appeals in the *Berkovitz* case[1] furnishes an opportunity for a reminder of the present legal status of commercial arbitration in this country and an outline of the steps yet to be taken to modernize the law upon this subject. For over three hundred years a dictum of Lord Coke has held sway over the legal minds of America. It is now on its fair way to decent burial. No movement in recent times has done more to bring the Bar and commerce into closer relation than the co-operative work of the past five years between the Chamber of Commerce of the State of New York and the New York State Bar Association. And now the American Bar Association, through its Committee on Commerce, Trade and Commercial Law, is taking up the work of nationalizing the movement.

Having been persuaded that American judges had been inadvertently led into following an obsolete theory of the law, the New York Chamber of Commerce was of opinion that the presentation of the more modern doctrine of the English courts would result in the correction of the judicial error in this country, as it had already been corrected in England by the English judges themselves. Accordingly, the Chamber had prepared to ask leave to intervene in such cases as would present the subject for reconsideration by the courts and had prepared a review of the authorities upon the subject.[2]

In 1914 the Bar Association of the State of New York created a committee known as the Committee on the Prevention of Unnecessary Litigation. At the 1916 session of the Association the Committee was authorized to negotiate with the Chamber of Commerce for the adoption of "Rules for the Prevention of Unnecessary Litigation," among which, under the heading, "Prevention of Litigation After the Facts Become Fixed and Before Suit," the Committee included:[3]

"After the facts upon which a dispute can be based have become fixed, either before or after a dispute has arisen, it is possible to do much to prevent litigation. What can best be done in each case, and whether with or without legal advice, necessarily depends upon the facts and the parties to the prospective controversy. Differences may

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[1] *Matter of Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y., 261, 130 N. E. 288.

[2] See Cohen, *Commercial Arbitration and the Law* (1918).

[3] 40 *Proceedings of New York State Bar Association* (1917) 387, 389, 390.

be minimized, adjusted or arbitrated. If not so disposed of litigation will usually ensue."

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"Where differences cannot be adjusted between the parties or their attorneys and the intervention of a third party becomes necessary, there are several forms which arbitration may take. The arbitration may be (1) informal, (2) under the Code, (3) under the auspices of a commercial body, or (4) under the auspices of a bar association.

"The experience of many business men and lawyers testifies to the advantage of these methods of adjusting differences wherever possible. They are inexpensive, speedy and peaceful."

At the Conference of Bar Association Delegates held in Cleveland in 1918, resolutions were adopted urging that in the interest of preventing unnecessary litigation the Bar should encourage the settlement of disputes out of court by arbitration as far as practicable.

The Committee on the Prevention of Unnecessary Litigation became the Committee on Arbitration of the New York State Bar Association. In its report of January, 1919,[4] that committee announced that it had become convinced "that the doctrine of revocability of such agreements is a legal anachronism which *should be eliminated from the law at the earliest moment* and should induce the courts to reverse their former rulings as the wisest method of correcting a judicial error of long standing." In that year the Committee submitted a proposed bill for the recognition and enforcement of agreements for the arbitration of controversies.

In 1920 three committees of the New York State Bar Association combined with the Committee on Arbitration of the New York Chamber of Commerce in the drafting of the statute, now the Arbitration Law of the State of New York.[5] The Committee on Law Reform said:[6]

"The demands of international commerce dictate that this nation should not be behind others, either in honesty or in the facilitation of contracts containing agreements for arbitration of disputes. The jealousy of judicial jurisdiction has led to a historical attitude of the Courts toward arbitration agreements, which is unintelligible at present to the business man. The subject has been the basis of a remonstrance from the London Chamber of Commerce to the Chamber of Commerce of the State of New York. In this day, it does not seem that any good public purpose is subserved by treating arbitration clauses as nullities and unenforceable."

The Committee to Act upon Recommendations of the Conference of Bar Associations said:[7]

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[4] 42 *Ibid.* (1919) 93.
[5] Laws, 1920, ch. 275.
[6] 43 *Proceedings of New York State Bar Association* (1920) 282.
[7] *Ibid.* 127, 128.

"The chairman[8] believes that the courts should be given opportunity to correct their error before relief is secured by legislation. His colleagues upon this Committee share with him the view that while it is desirable that judicial error should be judicially corrected, and that resort to legislation should, as a matter of general policy, not be had in such matters, and while they do not wish to discourage the efforts of the Chamber of Commerce, they are nevertheless of opinion that if the great State of New York is to be the international commercial center it aspires to be, it must speedily set its house in order and not wait for the slow and tedious process of judicial correction of judicial error to be applied in this field. It must promptly simplify its judicial procedure and must make available to business men the easy methods of commercial arbitration. The anomalous situation now existing in the difference between the law in all other parts of the civilized world and the law in our own State should not be permitted to continue. Only in our own country is an agreement to arbitrate differences treated as something against public policy, as a contract less sacred and binding than other commercial agreements. For these reasons your Committee has conferred with the Committee on Arbitration of the New York State Bar Association and with the chairman of the Committee on Law Reform, and members of all three committees have joined in the draft of the proposed Act. . . . . *This Act,*[9] *in the opinion of your Committee, will tend to put the State of New York in the lead in the matter of recognition of arbitration provisions of ordinary commercial contracts and provide a simple method for safeguarding the machinery of commercial arbitration.*"

The statute does not merely validate and make enforceable and irrevocable agreements for arbitration. The act recognizes that the infirmities, common to all contracts, which furnish ground for revocation at law or in equity, may still exist in cases of arbitration agreements. Next, if there be any dispute regarding the making of the contract or submission, or if the existence of a dispute is denied, a trial of that issue by the court, with a jury, if it is desired by either party, and without, if it is not, is preserved. The sections of the New York Code of Civil Procedure relating to the conduct of submissions are retained, so that if an award is made, based upon an incomplete submission, or affected by fraud, corruption, partiality, mistake, or any similar misconduct, or if the arbitrators have exceeded their jurisdiction or made an imperfect award, the award may be vacated or modified as the circumstances dictate. The award may then be enforced as a judgment, and as such, an appeal may be taken from it. And, similarly, from an order vacating an award the right of appeal is preserved.

In other words, the rights of both parties are reasonably safeguarded, and no common-law or constitutional right to a jury trial or to the protection of the courts is taken from them, except so far as by their express agreement they themselves have provided that the arbitrators,

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[8] The writer of this article.

[9] The present arbitration law, see note 5 *supra.*

instead of court and jury or court without jury, shall pass upon certain questions of fact better suited for decision by them than by strangers to the customs and practices of the trade.

The statute does not merely correct and modernize the rule. It does not merely make the law of New York State conform to the public policy now prevailing throughout the world. It establishes legal machinery for protecting, safeguarding and supervising commercial arbitration. Instead of narrowing the jurisdiction of the Supreme Court it broadens it. It adds to its equity powers. It preserves the right of trial by jury where it should be preserved, and leaves the parties free to waive the jury trial, where they care to waive it.

Presumably men of commercial experience today need no guardianship for determining, at the time of making a contract, whether they prefer the opinion of their own trade upon technical questions, or the hazardous judgment of a jury of the vicinage. They know whether the contract is of a kind under which disputes can better be disposed of by trade committees or by twelve inexpert strangers to the trade. They know whether or not they prefer to have judicial selection of arbitrators, and the statute leaves them free either to provide their own method for selection or to leave it to the court.

Thus two practical results are accomplished. The courts are relieved of the burdensome technical trade questions which heretofore have been decided by juries, advised by the very experts, as witnesses, who are now selected by the parties to dispose of the issue. By one movement there is removed the expensive and time-consuming process of determining simple questions of trade customs and trade facts. Questions of damages involving consideration of market values are likewise disposed of on the basis of trade experiences. On the other hand, the supervision of arbitrations by the court is preserved. Instead of being ousted of jurisdiction over arbitrations, the courts are given jurisdiction over them, and where fraud, palpable mistake, or failure to consider the evidence in the case is presented, the party aggrieved has his ready recourse to the courts. In short, if the parties believe that the waiving of technical objections to the admission of evidence and of a jury trial are in their interest, they may so waive them by entering into an arbitration agreement. And why shouldn't they? Litigation naturally involves friction, the breaking up of former friendly relations, either with the bringing of the suit or in the trial. In many instances it is necessary. But merchants and trade subsist on the continuity of friendly relations in spite of occasional controversy. Business men know that in spite of all effort differences will arise—honest differences which may either promote friction, heat, engender passion, and arouse the worst feelings on the part of the persons involved, turning a small blaze into a conflagration, or may be disposed of as matter of trade routine with no injury to pride or conscience. No wonder that

sensible merchants seek a legal method which will enable honest men to settle their differences without friction and the breach of trade relations. As was said by Lord Stair, in 1693,

"Nothing is more prejudicial to trade than to be easily involved in pleas, which diverts merchants from their trade, and frequently mars their gain and sometimes their credit."[10]

Lord Kenyon said, in 1788, in *Halfhide v. Fenning*:[11]

"Such references are very advantageous to the parties; as arbitrators are more competent to the settling of complicated accounts than the officers of courts of law or equity."

Lord Eldon, in 1808, in *Waters v. Taylor*[12] referred to litigation of the parties as "calling down upon them an interposition, perhaps not the most ruinous, but that cannot take place without infinite mischief to all, who may have any interest in the subject," and so "I shall give them an opportunity to pause, and consider, whether they will press for my determination, or have their disputes determined by"—note the language here—*"that more wholesome mode, which they have themselves provided."*[13]

Lord Campbell, writing the majority opinion in *Scott v. Avery*,[14] said:

"It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract. . . . . Public policy, therefore, seems . . . . to require that effect should be given to the contract."[15]

And now Judge Cardozo, writing the unanimous opinion of the Court of Appeals, says:[16]

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[10] *Mackenzie v. Garvan* 3 Sess. Cas. (2d series) 318, 323.

[11] 2 Brown's Ch. 336, 337.

[12] 15 Ves. Jr. 10, 20.

[13] Lord Chancellor Cranworth in *Drew v. Drew* (1855, H. L.) 2 Macq. Rep. 1, 4, spoke of the rule of unenforceability as "an inconvenient, and, I think I may be allowed to say, an irrational state of the law, which has since been rectified. . . ."

[14] (1855) 5 H. L. C. 811, 851.

[15] And even Coleridge, who dissented from the decision of that case, admits that he certainly is "not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals." *Ibid.* 843.

[16] *Matter of Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y. 261, 276, 130 N. E. 288, 292. See also *White Eagle Laundry Co. v. Slawek* (1921) 296 Ill. 241, 129 N. E. 753, where a statute (Hurd's Ill. Rev. Sts. 1919, ch. 10), similar to the New York Law, was upheld. In another recent case, a Federal District Court refused to apply the New York Statute and held an arbitration agreement unenforceable. The decision, however, appears to rest entirely upon the authority of previous cases in higher federal courts. Judge Mack recognizes in his opinion

"We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. *The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do.* They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation." (Italics ours.)

It is no exaggeration to say that at the present moment commerce and trade are passing through one of the greatest crises in their history, and, as the Federal Reserve Bank is acting as a stabilizer for money conditions, existing systems of commercial arbitration are acting as stabilizers of commercial relations. That arbitration clauses are now legally enforceable in New York is a strong inducement toward adjusting trade difficulties out of court and thus preserving the good relations between the parties, while securing a fair and reasonable adjustment of the controversy in hand. This is the public policy behind the statute, and its efficacy as a preventive of unnecessary and burdensome litigation is as demonstrable as that sanitation is a preventive of disease.

The source of the common-law doctrine of the revocability of arbitration agreements is to be found in *Vynior's Case.*[17]

It is clear from a study of the authorities of this period that the reason agreements for arbitration were, in the opinion of the judges, revocable, was a mistaken idea of the nature of the arbitrator's authority. Chief Justice Coke in *Vynior's Case,* and the judges and commentators who followed him, treated the authority of an arbitrator as that of an agent, which clearly it is not. An agent receives his power from an individual, and without consideration. From those circumstances alone is the authority revocable at the principal's will. But when two parties of opposing interest mutually agree that a third person shall have power by his decision to bind each of them, the elements of a bilateral contract exist, and there is a consideration running to each for the irrevocability of the arbitrator's power. As between the parties he

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that the modern tendency is in accord with the New York and Illinois Statutes. See *Atlantic Fruit Co. v. Red Cross Line* (Sept. 24, 1921) U. S. D. C. S. D. N. Y., N. Y. L. JOUR. Oct. 20.

[17] (1609, K. B.) 4 Coke, 302. The law as it stood after that decision is best stated in March, ***Actions on Slander and Arbitraments*** **(1648).**

is no longer a simple agent. His authority represents the promise of each to the other, and is no more to be revoked at will than any other term of a bilateral agreement.[18] But the elements of simple contracts and rights conferred thereby were not clear to Elizabethan jurists, nor were the doctrines of agency beyond their earliest infancy. Into this cloud of misunderstanding and reverence of precedent came the great authority of Coke, and by an ill-considered dictum was fixed the rule that an arbitrator's authority was revocable.

But even in Coke's time the judges did not say that the arbitration agreement was in every sense *void*. For in *Vynior's Case* a bond had been entered into conditioned upon the performance of the arbitration, and while the defendant was considered to have the *power* to revoke the arbitrator's authority, yet by so doing *he broke his agreement* and forfeited the bond, hence the plaintiff was allowed to recover thereon. *In other words, a remedy was given upon the contract.* It was not in form an action for breach of the agreement. That was not yet permitted. Plaintiffs must shape their causes to an assumpsit still founded on an action on the case, or else sue in debt upon the obligation of a bond. But the result and the intention were the same—to recompense the obligee for the obligor's default—to give him a remedy for the breach of the agreement. This remedy may be presumed to have been adequate, for if the legal adviser of those days were wise, he put the penalty in such sum as would cover his client in case of the withdrawal of the other party from the arbitration. But this, of course, was before fines and penalties were abolished. When they were prohibited,[19] it then left the aggrieved party with a *remedy,* it is true, namely, an action for damages for the breach of the covenant to arbitrate, a remedy which, as we know, survives to this day, but a remedy which, from a practical viewpoint, that is the establishment of damages, was inadequate. As Fletcher Moulton says in *Doleman & Sons v. Ossett Corporation.*[20]

"It will be evident, however, that the remedy in damages must be an ineffective remedy in cases where the arbitration had not been actually entered into, for it would seem difficult to prove any damages other than nominal."

As time went on and the notions of simple contract and its effect became clearer to the English judges, the fallacy in the rule of *Vynior's Case* appeared to them. It was at this time that the doctrine of *ouster of the court's jurisdiction* was evolved. The origin of that rule lies in *Kill v. Hollister.*[21] The case is reported in eleven lines, and the rule

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[18] *Collins v. Oliver* (1844, Tenn.) 4 Humph. 439, 440.
[19] See Cohen, *op. cit.* ch. 12.
[20] [1912, C. A.] 3 K. B. 257, 268; see also Cohen, *op. cit.* 151.
[21] (1746, K. B.) 1 Wils. 129.

is put forth upon no authority whatever and without discussion. But it was first stated at a period when the struggle between the various courts for the extension of their jurisdiction was still rife, and the bitter feeling engendered by the struggle of Coke and Bacon was not yet settled.

The rule was not immediately accepted as a determining precedent. In *Halfhide v. Fenning*,[22] Lord Kenyon held good the defendant's plea that, by the articles of copartnership between the parties, all differences which might arise were to be referred to arbitration and that the matter in dispute had not been so referred.

Almost immediately thereafter, in *Mitchell v. Harris*[23] the doctrine of *Kill v. Hollister, supra,* was dragged from its resting place in the old reports and quoted as a determining authority, and upon it a plea, based upon an agreement to arbitrate, was held bad. And this remained the English Law until the middle of the nineteenth century.

Nevertheless, in *Dimsdale v. Robertson*[24] Lord Chancellor Sugden said: "I think that *Halfhide v. Fenning* is still law."

His belief was confirmed and the process of reversing the old rule was begun in the case of *Scott v. Avery*.[25] This was not a unanimous decision, for some of the judges preferred still to remain in line with precedent, though realizing the weakness of the reasons theretofore given for the rule. Baron Martin and Lord Coleridge were persuaded that the old basis for the rule could not be sustained even in their day and so put the rule upon the new ground of public policy. Their opinion, however, was overruled by the majority of the lords, and the law of England immediately after *Scott v. Avery* was that where a contract provided that no action should be brought between the parties until arbitrators have disposed of any dispute which might arise between them, *"there is abundant consideration for that in the mutual contract into which the parties have entered; therefore, unless there is some illegality in the contract, the courts are bound to give it effect."*

This, of course, was not yet a complete reversal of the rule and amounted only to holding that an agreement that arbitration should be a condition precedent to any right of action upon the broken contract was valid. Such was the rule enunciated by the courts of New York in the case of *D. & H. Canal Co. v. Pa. Coal Co.*[26] The English courts, after a long struggle, however, came finally to a complete reversal of the old doctrine and, contrary to general supposition in this country, corrected the law, not because of the acts of Parliament, but as a matter

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[22] (1788) 2 Brown's Ch. 336, 337. See *supra* p. 151.
[23] (1793, Ch.) 2 Ves. Jr. 129.
[24] (1844, Ch.) 2 Jones & La Touche, 58.
[25] (1855) 5 H. L. C. 811.
[26] (1872) 50 N. Y. 250.

of judicial development of the common law.[27] Our own courts, not having had brought to their attention heretofore this recent clarification of the law by the British courts, are still following English precedents long since reversed by English courts.

This result in England was not accomplished without a struggle, for, commencing with the decision of *Scott v. Avery,* two distinct lines of cases developed, one limiting it to its narrowest interpretation, the other broadening it into a rule that all agreements for arbitration were valid. Aided, no doubt, by the manifestation of public policy shown by the English Arbitration Act of 1889, the judges who supported the latter construction were finally victorious.[28]

In *Hamlyn & Co. v. The Talisker Distillery,*[29] the contract provided for the arbitration of any dispute which should arise out of the contract. It was held, first, that the validity of this clause should be decided according to English law, and, second, that *under the law of England such a clause is valid.* Lord Watson said:[30]

"The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter."

Thus in England the long struggle between Coke's dictum and other precedents on the one hand and reason and experience on the other was ended. The later decisions of the English courts have only amplified further the power of the court to recognize and enforce arbitration agreements, until in *Re Arbitration between Wulff and Dreyfus & Co.,*[31] the English court went so far as to hold binding the submission to *counsel* of a special case originally prepared for the opinion of the court and the agreement of the parties *to accept the decision of counsel in place of that of* the appellate court.[32]

In the *Stebbing* case,[33] the court went so far as to hold that arbitrators might pass upon the question whether statements made by the assured upon the basis of which the policy was issued were true. For while

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[27] See Cohen, *op. cit.* ch. 16.

[28] *Ibid.*

[29] [1894, H. L.] A. C. 202.

[30] *Ibid.* 211.

[31] (1917, C. A.) 117 L. T. R. 583.

[32] Among the later cases decided are the following: *Smith, Coney & Barrett v. Becker, Gray & Co.* [1916, C. A.] 2 Ch. 86; *Gray v. Lord Ashburton* [1917, H. L.] A. C. 26; *Clements v. County of Devon Ins. Com.* [1918, C. A.] 1 K. B. 94; *Stebbing v. L. & L. & G. Ins. Co.* (1917, K. B.) 33 T. L. R. 395; *Clough v. County Live Stock Ins. Assn.* (1916) 85 L. J. K. B. 1185; *Lobitas Oil Fields Ltd. v. Admiralty Com.* (1917) 86 L. J. K. B. 1444; *Brodie v. Cardiff Corp.* [1919, H. L.] A. C. 337; *Woodall v. Pearl Assur. Co. Ltd.* [1919, C. A.] 1 K. B. 593.

[33] See note 32 *supra.*

their falsity might avoid the policy, nevertheless, " this is a matter of difference arising out of the policy."

It must be remembered that an arbitration clause is only part of a larger contract. While in the legal sense the arbitration provision is severable, in that, though unenforceable itself, it does not avoid the rest of the contract, yet the only practical object of such clause is in its relation to the rest of the contract, providing for sale, construction, payment, etc. If any of these provisions be broken, a right of action for damages accrues thereon at once. The purpose of the arbitration clause is to provide a remedy additional to and other than the action for damages. In making the contract the parties have in mind that if a breach or a dispute arises they may go to court to enforce their rights in the usual manner, but that they do not wish to be limited to that form of remedy. They are at the time amicably disposed and have a desire not to press their legal rights against each other to the extent of litigation—they wish to preserve a general good will between themselves. Their purpose is to obtain the performance of the contract with due regard to the rights of each and with good feeling, and they recognize that often questions of a technical nature arise which only experts in their own line can properly pass upon. Therefore, they provide that in the event of dispute it shall be decided by persons of their own choosing, peculiarly fitted to deal with the facts of the trade, and that each will waive his rights to the ordinary remedies in a court of law. Obviously then, the courts are obliged to treat the matter as solely one of remedy.[34]

At common law a right of action for damages accrued upon breach of the arbitration clause even after the abolition of fines and penalties. This right is recognized and has often been stated by the courts. Thus in *Haggart v. Morgan*[35] the court says:

"The motion for a nonsuit was properly overruled. *First,* because the

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[34] "They (arbitration agreements) do not affect to touch the obligations of the parties, as surely they do not; they prescribe how the parties must proceed to obtain any redress for their wrongs, which covers only remedies. In one sense everything which touches the remedy touches the obligation, since the only sanction to performance rests in the remedy; but that is the speech of philosophers, not of lawyers, among whom the distinction has arisen and is real." Learned Hand, J., In *Aktieselskabet* K. F. K. v. *Rederiaktiebolaget Atlanten* (1916, S. D. N. Y.) 232 Fed. 403, 405.

So Mr. Justice Cardozo holds: "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. *Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.*" (Italics ours.) Matter of *Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y. 261, 270, 130 N. E. 288, 289.

[35] (1851) 5 N. Y. 422, 427.

agreement to arbitrate, *only entitled the party to damages,* but was no bar to an action." (Italics ours.)[36]

Nor is the aggrieved party always limited merely to nominal damages. Where he has gone to expense in preparing for or executing the arbitration, before his co-party repudiates the agreement, he may recover such expense, and could, of course, recover any other damages the amount of which he could prove.[37]

The right upon such a broken contract is, therefore, not a bare unproductive right, but in a proper case may be invoked to re-imburse the plaintiff in a substantial amount.

Section 2 of the New York Arbitration Law reads as follows:[38]

"*Validity of arbitration agreements.* A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The question in the *Berkovitz* case[39] was: Is this clause applicable to contracts made before the passage of the law? Even a casual reading of this section would seem to demonstrate, with all reasonable certainty, that the legislature intended that agreements for arbitration contained in contracts made before the enactment of the statute should be treated as valid, enforceable and irrevocable. The legislation provides that "a provision in *a written contract* to settle by arbitration a controversy *thereafter* arising" shall be valid. But, as to submission, they say that "a submission *hereafter* entered into" shall be valid. It is perfectly clear that the natural signification of the phrase *"a written contract"* is to include *all* written contracts, whether past or future. It cannot in any sense be held to exclude pre-existing contracts. The sole question is whether the legislature intended to exclude them. That they did not so intend is obvious from another word used in the same clause. The section relates to a submission *hereafter* entered into. Submissions of existing disputes are contrasted with contracts for the arbitration of future controversies, and, if the enforceable submission are those *hereafter* entered into, it follows inevitably that *all* written contracts, *whether heretofore or hereafter* made, are included within the scope of the act,

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[36] To the same effect are: *Finucane Co. v. Bd. of Education* (1907) 190 N. Y. 76, 83, 82 N. E. 737, 739; *Hamilton v. Home Ins. Co.* (1890) 137 U. S. 370, 385, 11 Sup. Ct. 133, 138; *Doleman & Sons v. Ossett Corp.* [1912, C. A.] 3 K. B. 256, 268.

[37] This relief was actually given in: *Miller v. Canal Co.* (1869) 41 N. Y. 98; *Union Ins. Co. v. Central Trust Co.* (1899) 157 N. Y. 633, 52 N. E. 671.

[38] Laws, 1920, ch. 275.

[39] See note 1 *supra.*

else an equivalent expression would have been used as to them. And so the Court of Appeals held.

The New York Law obviously was enacted to correct a pre-existing rule, and a retrospective application made for no disadvantage, created no injustice and violated no statute of limitations. Rather it made effective a promise as solemn and as sacred as the promise to pay or the promise to deliver. The parties were of full age. They weighed the benefits and the obligations of the contract they were about to make, and the benefits tipped the scales. After breach, one party claims the *right* to repudiate his pact. To support this right he calls upon a rule founded on a misunderstanding of the principles of law, strengthened by a jealousy of jurisdiction now discountenanced, continued only by respect for authority. The experience of centuries of commercial arbitration casts doubt upon his sincerity—it is the defaulting party who breaks his promise to arbitrate, the party who has most to gain by delay and technicality. The common knowledge of mankind bears out these facts. The legislature was cognizant of them.

Dowling, J., in the opinion of the Appellate Division below,[40] based his decision upon an erroneous understanding of the law. He said, summarizing the reasons for the court's decision:

"To hold otherwise, would be to attribute to the Legislature an intent to deprive one party to an agreement of his *absolute right to terminate it at will,* to give to the other party an irrevocable right where theretofore it was revocable at the will of the other party, and to create a new remedy for the enforcement of his new right." (Italics ours.)

So far as the Appellate Division based its construction upon an "absolute right to terminate" the contract at will, it was opposed to the weight and current of authority in this country.

The cases holding that no man has a vested right to break or avoid a contract into which he has entered are numerous and apply to a great variety of subjects. One of the best statements of the rule in this State is to be found in *Brearley School v. Ward.*[41] This case involved the construction of Section 1391 of the Code of Civil Procedure, as amended, to allow execution to issue in some cases where thitherto it had been prohibited. In *Laird v. Carton,*[42] the court construed this amendment to be retrospective in its application, upon the ground that it affected a remedy only. In the *Brearley* case, the defendant contested the constitutionality of such a retrospective application so far as it allowed execution to be levied upon part of the income from a trust fund created by a will probated prior to the enactment of the amendment. The court held that there was no merit in his defence.[43]

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[40] (1920) 193 App. Div. 423, 427. [41] (1911) 201 N. Y. 358, 94 N. E. 1001.

[42] (1909) 196 N. Y. 169, 89 N. E. 822.

[43] See language of court in *Brearley case, supra,* 201 N. Y. 358, 363, 364, 367, 368, 371.

As the court said in *Shields v. Clifton Hill Land Co.*:[44]

"'A party has no vested right in a rule of law which would give him an inequitable advantage over another, and such rule may therefore be repealed, and the advantage thereby taken away. To illustrate this remark, if by law a conveyance should be declared invalid if it wanted the formality of a seal; or a note, if usurious interest was promised by it; *or if in any other case, on grounds of public policy, a party should be permitted to avoid his contract entered into intelligently and without fraud, there would be no sound reason for permitting him to claim the protection of the Constitution, if afterwards, on a different view of public policy, the Legislature should change the rule,* and give effect to his conveyance, note, or other contract, exactly according to the original intention. Such infirmities in contracts and conveyance are often cured in this manner, and with entire justice; and the same may also be done with defects in legal proceedings, occasioned by mere irregularities.'" (Italics ours.)

Judge Cardozo, who wrote the opinion in *Jacobus v. Colgate,*[45] clearly perceived the distinction between that case and the point involved in the *Berkovitz* case. He said:[46]

"Our decision in *Jacobus v. Colgate,* much relied upon by counsel, has little pertinency here. We dealt there with a statute which gave a remedy for a wrong where there had been no remedy before. Right and remedy coalesced, and took their origin together. Finding them so united, we construed the statute which defined them as directed to the future. Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one.

We think the promise to arbitrate must be held within the statute, and the subject-matter of the controversy within the purview of the promise."

The claim that the statute was unconstitutional in depriving the party of his right of trial by jury was disposed of by the Court of Appeals in these words:[47]

The court cites *Curtis v. Leavitt* (1857) 15 N. Y. 9 and *Ewell v. Daggs* (1883) 108 U. S. 143, 2 Sup. Ct. 408. An earlier case upon the point in the United States Supreme Court, one of the leading cases in this country, is *Satterlee v. Matthewson* (1829, U. S.) 2 Pet. 380. See also *Gross v. United States Mortgage Co.* (1883) 108 U. S. 477, 488, 2 Sup. Ct. 940. 946. One of the earliest and best-considered cases in the State of New York is *Van Rensellaer v. Snyder* (1855) 13 N. Y. 299, 303. See also *Syracuse City Bank v. Davis* (1853, N. Y.) 16 Barb. 188; *Washburn v. Franklin* (1861, N. Y.) 35 Barb. 599; *Johnson v. Bentley* (1847) 16 Ohio, 97, 100.

[44] (1894) 94 Tenn. 123, 149, quoting from 2 Story, *The Constitution* (5th ed. 1891) 703.

[45] (1916) 217 N. Y. 235, 111 N. E. 837.

[46] *Matter of Berkovitz v. Arbib & Houlbert, supra* note 1, at p. 272, 130 N. E. at p. 290.

[47] *Ibid.* 273, 130 N. E. at p. 291.

The statute is assailed as inconsistent with article I, section 2, of the Constitution of the state, which secures the right of trial by jury. The right is one that may be waived. It *was* waived by the consent to arbitrate. We are told that the consent must be disregarded as illusory because the parties could not be held to it till the statute was adopted. A consent, none the less, it was, however deficient may once have been the remedy to enforce it. Those who gave it, did so in view of the possibility that a better remedy might come. They took the chances of the future. They must abide by its vicissitudes.

At the same time that the New York Court of Appeals decided the *Berkovitz* case, it decided *Spiritusfabriek Astra v. Sugar Products Company.* In the latter case a contract for molasses was made in July, 1914. One of the provisions in the contract was: "The regular arbitration and force majeure clauses are to form part of this contract . . . . .It is agreed in the event of an arbitration being called, it is to sit in London." The plaintiff, the buyer, brought action against the seller in July, 1916. The defendant answered with defences and counterclaims. Between July, 1916, and April 19, 1920, there was active litigation. The Court of Appeals held that, since the plaintiff had spent several thousand dollars for fees and disbursements and that only upon the eve of the trial (June, 1920) the defendant moved for a stay of proceedings until the matters in difference were arbitrated, the statute should not be applied to *pending litigation,* and that clear contrary intention could not be found in the language of the statute. The decision in this case stands by itself and, while important to the litigants, plays no important part in the general development and status of the law in New York.

As was said at the outset, the decision in the *Berkovitz* case paves the way for modernizing the American law on the subject of commercial arbitration. At the meeting of the American Bar Association held in St. Louis in 1920, resolutions were adopted calling upon the Committee on Commerce, Trade and Commercial Law to prepare a Federal law on the subject.[48] The first draft of such a bill was presented at the 1921 session of the Association and the Committee is now re-drafting the bill.

Thus is the Bar of our country responding, at least in one field, to the call that *anachronisms in the law be abolished*[49] and the law be made to conform to modern needs and conditions.

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[48] Charles A. Boston, of New York. "I have a second motion. I ask that this be referred without debate to the Committee on Commerce, Trade and Commercial Law of the American Bar Association. It is that that committee be requested to consider the report at the next annual meeting of this Association upon the further extension of the principle of commercial arbitration." 45 *Reports of American Bar Association* (1920) 75.

[49] See paper by Dean Roscoe Pound, *Anachronisms in Law,* delivered before the Conference of Bar Association Delegates at Saratoga Springs, N. Y.. September 3, 1917-(1920) 3 JOUR. AMER. JUDICATURE SOC. 142.